



The Committee on Energy and Commerce

Memorandum

June 25, 2012

To: Members and Staff, Subcommittee on Communications and Technology

From: Majority Committee Staff

Re: Hearing on “The Future of Video”

The Subcommittee will hold a hearing Wed., June 27, 2012, at 10:00 a.m. in 2123 Rayburn House Office Building on “The Future of Video.” One panel of witnesses will testify.

1. Charlie Ergen, Chairman, DISH Network
2. Robert W. Johnson, CEO, Sky Angel
3. David Hyman, General Counsel, Netflix
4. Jim Funk, Vice President, Product Management, Roku
5. Gigi B. Sohn, President & CEO, Public Knowledge
6. David Barrett, President and CEO, Hearst Television Inc.
7. Michael P. O’Leary, Senior Executive Vice President, Global Policy and External Affairs, Motion Picture Association of America
8. Michael Powell, President and CEO, National Cable & Telecommunications Association

The Communications Act is woefully out of step with the state of competition and technology in video distribution and programming. Cable operators had 98 percent of the pay-TV distribution market when Congress passed the 1992 Cable Act amendments and 53 percent of national program networks were at least partially owned by a cable operator. At the time of the 1996 Telecommunications Act amendments, cable still had an 89 percent share and 44 percent of national networks remained vertically integrated with a cable company. By contrast, as of 2006, the last year for which the FCC has released data despite its statutory duty to issue annual video reports, cable’s market share had dropped to 68 percent and only 15 percent of national networks were vertically integrated with a cable operator. The two nationwide direct broadcast satellite providers had 29 percent of the pay-TV market and were the second and third largest providers, which they remain today. Over the same interval of years, the percentage of homes with televisions relying exclusively on over-the-air broadcasting dropped from 36 to 27 to 13 percent. Meanwhile, the number of national program networks has grown from 106 to 565 between 1994 and 2006.

The market has continued to evolve since 2006. The 2009 DTV transition tripled the channels broadcast stations can transmit and some broadcast stations are also rolling out mobile TV. Wireless carriers are streaming video. Programmers and pay-TV providers are putting their content on smartphones and tablets. Within the last ten years, YouTube, iTunes, Netflix, Amazon, Hulu, Roku, Sky Angel and others have begun providing video over the Internet. Verizon FiOS and AT&T U-Verse each provide TV service to 4 million households. Video providers have more sources of content, programmers have more sources of distribution, and viewers have more options than ever before. This hearing will examine where the video market and technology are headed, whether regulation of the old guard still makes sense, and whether regulation should be expanded to new technologies and services. What follows is a summary of some of the issues that may arise.

Retransmission Consent and Program Carriage. Retransmission consent and program carriage deals are best left arranged by the respective parties and their viewers, free from regulatory intervention. These deals involve negotiations between broadcasters or non-broadcast programmers for access to pay-TV distribution on one side, and cable or satellite operators for access to programming on the other. Both sides in the negotiation hold valuable assets and both sides should have the right to withhold those assets if they do not believe a proposed deal amounts to a “good deal”. Only if both sides face a genuine risk that programming might be dropped can a true negotiation take place. Whether it is programmers asking for access to “must-have” distribution or distributors asking for access to “must-have” content, calls for “standstills,” government-forced arbitration, or other regulatory interference should be seen for what they are: attempts by parties to get a leg up in a negotiation. In some cases a distributor or programmer changes sides between support for and opposition to government involvement depending on the contour of a particular deal and the state of the negotiation. This changing perspective by parties on the necessity of regulatory involvement provides the best evidence that a robust market exists and is without need of regulatory interference.

The alternative is to ask regulators to weigh the relative value of particular carriage and particular programming, a risky proposition. At best this shifts money from one company's pocket to another's. At worst, it discourages investment in distribution and programming and diminishes diversity of content. Why would distributors experiment with carriage of unique content if they have a legal right to the most popular content of the day? Why would a programmer risk capital creating new content if there is little “shelf space” left because distributors have adversely possessed the hit shows of the moment or other programmers have muscled their way onto every cable and satellite platform? Regulatory intervention potentially puts the government in the middle of every negotiation and may embolden parties to make larger demands or to hold out longer than they should, to the detriment of viewers.

Service providers and programmers are closest to their audience and in a better position than the government to weigh the costs and benefits of carriage deals because both of these parties have something to lose: viewers. The viewers, meanwhile, have other providers and plenty of content to choose from should the parties make a bad decision. And with video available in almost every market from at least one cable operator, two satellite providers, and increasingly a phone company or the Internet, the same content is often accessible from at least one other source. It may even be available for free over the air or on a lawful website. The number of options viewers have and the financial interest the parties have in making a deal are perhaps why the vast majority of negotiations are consummated.

There are provisions of the Communications Act, however, that already put the government's finger on the negotiating scale to the detriment of pay-TV providers. The “must-carry” rules grant broadcasters a right to demand carriage on a cable or satellite system, although without compensation. As a result, broadcasters without popular content—who might otherwise need to pay cable and satellite operators for carriage—elect must-carry and rely exclusively on advertising to generate revenue. Meanwhile, broadcasters with popular programming still elect retransmission consent because they can collect money from cable and satellite operators for carriage. The “basic-tier” requirement entitles broadcasters carriage on the entry-level programming tier that cable and satellite providers offer subscribers. The “buy-through” requirement prohibits cable and satellite operators from selling subscribers other tiers, like for premium movie and sports channels, unless the subscribers have purchased the basic tier. The

“program access” provisions allow the FCC to place restrictions on the rates, terms, and conditions a vertically integrated cable operator or programmer may place on a carriage deal, including restrictions on exclusive deals and whether vertically integrated cable operators and programmers may even refuse to enter into a deal. All these provisions restrict to varying degrees the ability of cable and satellite operators to freely negotiate carriage. They also limit shelf space that might otherwise be available for non-broadcast programming. If any provisions should be revisited, these should, especially in light of the increased competition and changes in technology that have arisen since their adoption.

Other provisions, such as the network non-duplication and syndicated exclusivity rules, also limit the ability of cable and satellite operators to freely negotiate, but should not be revisited unless done at the same time as compulsory copyright provisions. The network non-duplication and syndicated exclusivity rules prevent cable and satellite operators from importing network or syndicated programming from out-of-market broadcast stations if the local stations have negotiated geographic exclusivity agreements with the rights holders of the programming. These provisions operate in tandem with the compulsory copyrights, which restrict the rights holders of broadcast content from prohibiting the content’s use and set the royalties, if any, the rights holders may collect. The network non-duplication and syndicated exclusivity rules’ restrictions on cable and satellite operators’ ability to freely negotiate broadcast program carriage ameliorate the compulsory copyrights’ restrictions on the rights holders’ ability to freely negotiate use of and compensation for the content. That is why any re-examination should occur together.

Satellite Television Reauthorization. The retransmission of broadcast signals by satellite television providers and the copyright royalties they pay, if any, to the rights holders of the underlying content are governed by the Communications and Copyright acts. A number of the provisions periodically expire, requiring Congress to reauthorize them. The most recent reauthorization, enacted through the Satellite Television Extension and Localism Act of 2010 (STELA), expires Dec. 31, 2014. Among other things, the satellite television authorization in the Communications Act contains: 1) the “carry-one, carry-all” must-carry provisions requiring satellite providers to carry every local broadcast signal into the local market if it carries any; and 2) the distant signal provisions restricting satellite providers’ retransmission of out-of-market broadcast signals into a local market to households that cannot receive local signals over the air.

“The Hopper.” FOX, NBC, CBS, and ABC are in a legal battle with DISH over whether the satellite provider’s “Hopper” digital video recorder and PrimeTime Anytime service violate copyright law and their contracts with DISH. The Hopper, when used in conjunction with DISH’s PrimeTime Anytime service, stores ABC, CBS, FOX, and NBC primetime programming so that subscribers can watch at any time any of the shows that have aired in the last eight days, as well as “auto hop” over the commercials starting the day after programs air. Subscribers can also save the programming indefinitely so long as they don’t run out of room on the Hopper. DISH argues that the recording and ad-skipping features are permissible “fair uses” under copyright law. The networks argue that the storing, recording, and commercial skipping goes beyond the “time shifting” that the Supreme Court ruled was a fair use in the *Sony Betamax* case over VCR recording. They argue that the automatic skipping of commercials jeopardizes the financial underpinnings of broadcast television. The networks also argue that the service amounts to the provision of an unauthorized on-demand service in violation of the specific retransmission consent and video-on-demand agreements they have entered into with DISH. The

networks filed a similar suit in 2001 against SONICblue over the ad-skipping feature of its ReplayTV digital video recorder. SONICblue went out of business before the court rendered a ruling.

Definition of Multichannel Video Programming Distributor. A company called Sky Angel has prompted a proceeding at the FCC that could result in the regulation of Internet-based video providers and content. Sky Angel provides subscribers a package of 80 program networks using a set-top box and subscribers' Internet connections. Many of the networks are the same as carried by cable and satellite providers. After getting into a carriage dispute with Discovery Networks, Sky Angel sought to file a program access complaint with the FCC. Because Sky Angel would need to be a traditional pay-TV provider—referred to in the law as a “multichannel video programming distributor”—to bring a program access complaint, the FCC opened a proceeding to determine whether Internet-based providers meet the definition of an MVPD.

The Communications Act defines an MVPD as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” The Act defines a “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).” The Commission's regulations define a “television channel” as “a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.” The Commission's regulations also define a “cable television channel” as a “signaling path provided by a cable television system.” The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”

If the FCC concludes that Internet-based video providers make available for purchase multiple channels of video programming, they might fall within the MVPD provisions of the Communications Act. On the one hand, they might then receive certain benefits, such as the right to seek relief under the retransmission consent and program access rules. On the other, they might also be subject to certain obligations, such as the must-carry requirement, the basic tier and buy-through requirements, the requirement to enable the competitive availability of set-top boxes, the requirements to abide by the network non-duplication and syndicated exclusivity restrictions and negotiate in good faith with broadcasters for retransmission consent, the Equal Employment Opportunity requirements, the closed captioning and emergency information requirements, and various technical requirements. Consequently, this proceeding may have far-reaching consequences for the future of video.

If you need more information, please call Neil Fried at (202) 225-2927.